Filed 2/17/09 P. v. Soto CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL H. SOTO,

Defendant and Appellant.

2d Crim. No. B201453
(Super. Ct. No. 2006044423)
(Ventura County)

Michael H. Soto appeals from the judgment following his conviction of making a criminal threat; disobeying a domestic relations order; driving in willful or wanton disregard while fleeing a pursuing officer; and delaying an officer. (Pen. Code, §§ 422; 273.6, subd. (a);**1** Veh. Code, § 2800.2, subd. (a); § 148, subd. (a)(1).) The court suspended the imposition of sentence and placed appellant on formal probation for a term of 36 months. Appellant challenges the sufficiency of the evidence and argues that the court violated the dual punishment prohibition of section 654 by punishing him for two crimes that arose from an indivisible course of conduct. We affirm.

1 All statutory references are to the Penal Code unless otherwise stated.

PROCEDURAL AND FACTUAL BACKGROUND

Prosecution Evidence

In 2006, appellant and Ellen Soto had been married for 15 years and lived in Ventura, California, with their 12-year old son. Ellen worked as a pharmacist at a local drugstore. Appellant was unemployed, severely depressed, permanently disabled, and in ongoing pain from ruptured disks in his neck. He had a medical marijuana card and often smoked marijuana. He also had prescriptions for Toprol XL, Lipitor, Buspar, Effexor XR, Xanax, and pain medicine. His social security disability payments were issued to Ellen. She gave him money as he needed it.

On November 16, 2006, Ellen came home in the late afternoon or evening. Appellant said that he needed money for car repairs. She asked to see receipts for the repairs. He got furious, went to the garage, and stayed there for hours.

Several hours later, at approximately 12:30 a.m., on November 17, Ellen went to the garage to try to work things out. Appellant shouted, demanded to be left alone, and said that he would hit her if she entered the garage. Using a broom handle, he hit and gouged the door separating the garage and house. He yelled at her, demanded money, and threw things around the garage. A portable stereo hit the dog.

Ellen called her mother, Mary Musial, who lived nearby, and asked her to call the police. An officer arrived at Ellen's home at about 2:00 a.m. He escorted appellant from the garage, at Ellen's request. She provided the officer with appellant's medication, some clothes, and money. Appellant took the items from the officer and walked away from the house. Shortly thereafter, Musial arrived at Ellen's house.

At approximately 8:00 a.m., on November 17, appellant returned and stood in front of Ellen's house. Despite her repeated requests that he leave, appellant remained for about 30 minutes. Ellen called the police and arranged for a locksmith to change the locks. Appellant called Ellen roughly 30 to 40 times a day at home and 20 to 30 times a day at work during the next several days. He also appeared at her workplace and home on several occasions, in an angry state, demanding his ATM card, social security card,

medical marijuana card, and money. On several occasions, Ellen gave him the car and money.

On November 22, Ellen obtained a restraining order while appellant was in court. The court ordered that appellant have no contact with Ellen, except as it ordered for visiting with their child. On November 23, appellant called Ellen at work several times to request his money and his cards. She could not find his cards.

On November 24, appellant called Ellen's home 46 times and called Musial 34 times. During one call to Ellen, he demanded his cards and said that he was going to the social security office to cancel his benefits. At Ellen's request, Musial drove her and her son to the social security office. Ellen left her son with Musial while she was in the office. Appellant approached Ellen while she was in the office speaking with an employee. He eventually left, at the request of the employee and Ellen.

Musial picked up Ellen and drove toward Ellen's house. Appellant approached in his car, drove it very closely behind Musial's car, and incessantly honked the horn. When he turned toward Ellen's house, Musial drove another direction, toward her own house. Musial, Ellen, and her son ran into Musial's house. The women locked the doors before appellant's arrival. He arrived and started yelling. Ellen called the police. While she awaited their arrival, appellant left his car, pounded on Musial's door and windows, yelled for his belongings, and demanded access to the house. He left before the police arrived.

When Ellen got home on November 24, she found a 4:55 p.m. message from appellant on the answering machine that stated, "I'm going to kill you." Fearing that he would carry out his threat, she called the police.

A few hours later, appellant was speeding on Highway 126, and weaving in and out of traffic. A California Highway Patrol (CHP) officer pursued and tried to stop him, using the CHP vehicle's overhead lights, siren, and public address system. Appellant responded with an obscene hand gesture and continued driving. He eventually

stopped abruptly in the middle of the road, abandoned his car, and ran. The officer pursued, caught, and arrested appellant.

Defense Evidence

Appellant's friend, Marilyn Fernandes, testified that appellant was uncharacteristically sleepy, agitated, angry, confused, and sometimes unkempt or disoriented from November 16 through November 24. His brother, Anthony Soto, testified that he received many weird calls from appellant from November 17 through November 24.

A CHP dispatcher testified about a log entry regarding the November 24, 2006, pursuit and arrest of appellant. The entry stated that appellant "show[ed] signs of 5150." (Welfare and Institutions Code section 5150 concerns the detention of mentally disordered persons.)

Patrick Barker, a clinical and forensic psychologist, evaluated appellant. He concluded that appellant suffered from a pain disorder, major depression, anxiety and cognitive disturbance, and that he had a low potential for violence and a high potential for suicide. Dr. Barker opined that during the period from November 17 through November 24, appellant was fluctuating in and out of a state of delirium.

DISCUSSION

Appellant argues that the evidence is insufficient to support his criminal threat conviction because he lacked the requisite intent, "in light" of his "apparent mental illness." We disagree.

In reviewing an insufficient evidence claim, we consider the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) We presume the existence of every fact supporting the judgment that the jury reasonably could have deduced from the evidence, and a judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139;

People v. Sanghera (2006) 139 Cal.App.4th 1567, 1573.) Here, we conclude that sufficient evidence supports appellant's criminal threat conviction.

Section 422 makes it a crime to "willfully threaten[] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ." (See also *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Appellant claims that he lacked the requisite intent to make a criminal threat because of his "apparent mental illness." The record belies his claim. Appellant's expert witness did not testify that appellant was in a state of delirium when he made the threat. Instead, he opined that over a period of several days, including the date of the threat, appellant fluctuated in and out of a state of delirium. The expert conceded that delirium can fluctuate quickly throughout the course of a day.

The jury reasonably concluded that appellant made a criminal threat against Ellen. On November 24, he left a message on her answering machine that said, "I'm going to kill you." He did so shortly after engaging in several aggressive acts toward her. He followed Musial's car at a close distance while Ellen was a passenger, honked his horn incessantly, arrived at Musial's house while Ellen was inside, and shouted and banged on Musial's windows and door. He also left scores of angry, demanding messages at Ellen's workplace, her home, and Musial's home, and made unannounced visits to Ellen's home and workplace. Substantial evidence supports the finding that appellant made a criminal threat to Ellen on November 24.

Appellant further argues that the court violated section 654 by punishing him for both driving in willful or wanton disregard while fleeing a pursuing officer (Veh.

Code, § 2800.2, subd. (a)) and delaying an officer (§ 148, subd. (a)(1)). He asserts that because both crimes arose from an indivisible course of conduct, the sentencing on one of the crimes should be stayed. We reject this claim as being premature.

Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one. . . ." The statute thus "precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.] If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed. [Citation.] Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. [Citation.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) The purpose of section 654 is "to ensure that punishment is commensurate with a defendant's criminal culpability. [Citations.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.)

The court in this instance suspended the imposition of appellant's sentence and granted probation. Accordingly, the application of section 654 is not presently at issue. "Because sentence was not imposed . . ., there is no double punishment issue. The section 654 issue should be presented to a court upon any future attempt to impose a double punishment . . . in the event of a probation violation." (*People v. Wittig* (1984) 158 Cal.App.3d 124, 137; see also *People v. Lofink* (1988) 206 Cal.App.3d 161, 168; *People v. Stender* (1975) 47 Cal.App.3d 413, 425, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 240.) "Probation is an act of grace and clemency designed to allow rehabilitation [citations] and is not within the ambit of the double punishment proscription of . . . section 654. [Citations.]" (*People v. Stender*, *supra*, at p. 425.)

Accordingly, the question of whether section 654 bars punishment for both the driving in willful or wanton disregard while fleeing a pursuing officer offense, and

the delaying an officer offense is an issue for consideration in the first instance by the trial court if there is a violation of probation and the imposition of a sentence at a future time.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Rebecca S. Riley, Judge

Superior Court County of Ventura

Gerald Peters, Attorney, under appointment by the Court of Appeal, for Defendant and Appellant.

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